March 14, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	State of Nevada
Date of Filing:	February 14, 2006
Case Number:	TFA-0149

On February 14, 2006, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on January 30, 2006 by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD released material and withheld 13 documents under Freedom of Information Act (FOIA) Exemption 5. This Appeal, if granted, would require ORD to release these documents to the Appellant.

I. BACKGROUND

On May 27, 2004, the Appellant filed a request for information under the FOIA with ORD. That request sought information concerning the License Support Network database being created by the DOE in connection with its application for a license to construct the Yucca Mountain Project (YMP). On November 24, 2004, ORD issued a determination letter (the Determination Letter) releasing numerous responsive documents to the Appellant and withholding numerous responsive documents in their entirety. On January 5, 2005, the Appellant filed an appeal of that determination with this office. We issued a Decision and Order on May 24, 2005 granting the Appellant's January 5, 2005 Appeal in part. On December 5, 2005, ORD issued a new determination letter as required by our May 24, 2005 Decision and Order. The December 5, 2005 determination letter released additional documents to the Appellant, but continued to withhold documents. The Appellant and ORD entered into apparently unsuccessful negotiations concerning these remaining documents. On January 30, 2006, ORD issued a supplemental determination letter clarifying its December 5, 2005 determination letter.

On February 5, 2006, the Appellant submitted the present Appeal challenging ORD's withholding determinations concerning 13 specific documents under Exemption 5. Appeal at 11-12. Specifically, the Appellant contends that:

1. information contained in the withheld documents cannot be withheld under the litigation work product exemption,
2. the description of the withheld documents contained in the Determination Letter is inadequate, and
3. ORD failed to weigh the public interest in disclosure against the harm that may result from disclosure.

Appeal at 2-3.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). In the present case, only the attorney work product privilege is at issue. The attorney work product privilege is among those privileges incorporated by the courts in litigation under Exemption 5. *Coastal States*, 617 F.2d at 862.

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The work product privilege, which is codified at Fed.R. Civ.P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g.*, *Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to civil proceedings, but extends to administrative proceedings as well. *See e.g., Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987); *Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

Turning to the present Appeal, it is clear that the 13 withheld documents are protected by the attorney work product privilege. Under the Nuclear Waste Policy Act of 1992 § 114(b), DOE is required to apply to the Nuclear Regulatory Commission (NRC) for a license to construct and operate the Yucca Mountain Geological Waste Repository. 42 U.S.C. § 10101. Under the NRC's regulations, DOE's application for this license commences a mandatory and adversarial administrative litigation proceeding. 10 C.F.R. §§ 2.101(f), 2.104(a). In order to facilitate the efficient and fair administration of this litigation, the NRC required ORD to create a database of information relevant to this proceeding, to be known as the Licensing Support Network (LSN). Each of the 13 withheld documents concerns ORD's attempts to comply with the NRC's mandate to create the LSN and the ORD's attempts to decide which information is to be included in the LSN. Accordingly, it is clear that each of the 13 withheld documents was prepared in anticipation of this litigation proceeding. From their context, it is evident that ORD produced these documents in anticipation of and *because of* the NRC's administrative litigation process.

Moreover, the documents contain sensitive, confidential information. Release of the 13 withheld documents would result in the exact type of harm that the attorney work product privilege is intended to prevent. If this information were to be released, opposing parties would be provided with the mental impressions, conclusions, opinions, legal strategies or

legal theories being considered by DOE for use in the upcoming administrative litigation proceedings before the NRC.

Accordingly, we find that ORD properly withheld each of the 13 withheld documents under Exemption 5's attorney work product privilege.

Adequacy of the Determination

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

The Appeal contends that the 13 withheld documents were inadequately described. We do not agree. We have consistently held that determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). In the present case, the descriptions of the documents provided in the Determination Letters clearly meet each of these three requirements and therefore provide an adequate description of the 13 withheld documents.

Public Interest in Disclosure

10 C.F.R. § 1004.1 mandates that "the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." The Appellant contends that release of the withheld information would be in the public interest. We disagree. The compromise of the DOE's ability to defend the public's interest in the administrative litigation proceedings before the NRC that would result from release of the withheld information, as we have discussed above, would not further the public interest.

III. CONCLUSION

For the reasons stated above, we have found that the information withheld under Exemption 5 by the Office of Repository Development was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0149, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial

review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director
Office of Hearings and Appeals

Date: March 14, 2006